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**Question: Discuss the relevance of Passing Off as a form of Economic Tort in 21st century Nigeria.**

**Introduction**

The same way tort law recognizes that one can negatively affect a person or their property through either negligence or intent, is that same way tort law also provides a structure for dealing with negligent or intentional acts done against a person’s business or source of revenue.  Economic torts offer protection for a person’s trade or business from acts which the law considers to be unacceptable. Economic torts are tortuous interference actions designed to protect trade or business.

Economic torts are torts which inflict financial losses or financial injury. Economic torts are torts which inflict economic losses. It occurs mainly in the economic, commercial or business sector of life. Economic torts include:

* Passing off;
* Breach of intellectual property rights; such as breach of copyright, patents, trademarks and other merchandise marks;
* Injurious falsehood/Malicious falsehood;
* Interference with contracts;
* Conspiracy to interfere, that, civil conspiracy and so forth

These torts represent the common law's historical attempt to balance the need to protect claimants against those who inflict economic harm and the wider need to allow effective, even aggressive, competition (including competition between employers and their workers).

However, for the purpose of this paper, this writer shall focus on passing off as a form of economic torts. Several attempts have been made to examine the tort of passing off and produce its relevance in the 21st century. The effort in this paper will therefore be to summarize succinctly what passing off is in itself and provide its significance in the 21st century.

**Overview of Passing Off**

Passing off is a form of economic tort which protects the [goodwill](https://en.wikipedia.org/wiki/Goodwill_%28accounting%29) of a trader from misrepresentation for example, that there is some sort of association between the businesses of two traders.

The essence of passing off is the selling of goods or the carrying on of a business in such a manner as to mislead the public into believing that the defendant’s product or business is that of the plaintiff, and the law on this matter is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by rival traders.[[1]](#footnote-2) The dictum regarding passing off was posited by ***Lord Kingsdown*** *in* ***Leather Cloth Co v American Leather Cloth Co.*[[2]](#footnote-3)** where he held that ‘…*the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader*.’

Passing off action is common law remedy for the unregistered trademarks which have acquired sufficient goodwill, against the unauthorized use of the mark by a third party. It is often used as an alternative remedy to trademark infringement. Traders whose marks remain unregistered but nevertheless have acquired sufficient goodwill (through the use made of them) can rely on passing off action to protect their unregistered right in the mark.[[3]](#footnote-4)

Passing off can take place in various ways. The examples are as follows[[4]](#footnote-5);

1. Marketing a product as that of the plaintiff: It is actionable passing off for the defendant to sell merchandise with a direct statement that the goods are manufactured by the plaintiff when, in fact, they are not. Thus, for example, it would be passing off for D, a manufacturer of tyres, to advertise and sell his tyres as ‘Dunlop’ or ‘Michelin’ tyres, since this would be an obvious attempt to profit from the goodwill and reputation established by rival businesses. ‘Goodwill’ in this instance has been defined *by* ***Lord Macnaghten*** *in* ***IRC v. Muller & Co’s Margarine Ltd*** as; ‘the benefit and advantage of the good name, reputation and connection of a business…the attractive force which brings in custom.[[5]](#footnote-6)
2. Trading under a name so closely resembling that of the plaintiff as to be likely to mislead the public into believing that the defendant’s business and that of the plaintiff are one and the same, as observed in ***Ogunlende v Babayemi***[[6]](#footnote-7)
3. Marketing goods under a trade name already appropriated for goods of that kind by the plaintiff, or under a name so similar to the plaintiff’s trade name as to be mistaken for it.
4. Marketing goods with the trade mark of the plaintiff or with any deceptive imitation of such mark.
5. Imitating the get-up or appearance of the plaintiff’s goods, as examined in ***U.K Tobacco Co. Ltd. v Carrera Ltd.*[[7]](#footnote-8)**

An action of passing off is a common law remedy that is actionable per se. this means that the claimant need not show proof of damage to be successful in an action for passing off. Therefore liability will ensure whether or not the defendant acted intentionally. A number of elements are key ingredients a plaintiff must prove in order to succeed in an action for passing off and this was propounded in [***Reckitt & Colman Products Ltd v Borden Inc***](https://www.bailii.org/uk/cases/UKHL/1990/12.html)**[[8]](#footnote-9)**, commonly known as the **"Jif Lemon” case or Classic Trinity:**

1. **Reputation**: the claimant must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public.
2. **Misrepresentation**: the claimant must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by him are the goods or services of the claimant.
3. **Damage to goodwill**: the claimant must demonstrate that he suffers or, in a *quia timet* action, is likely to suffer damage by reason of the erroneous belief engendered by the defendant’s misrepresentation that the source of the defendant’s goods or services is the same as the source of those offered by the claimant.

**The Relevance of Passing Off in the 21st Century**

Over the years, the tort of passing off has proven to be relevant to both manufacturers and consumers, as it protects unfair practices in business for both parties. It is an action not only to preserve the reputation of the manufacturers but also to safeguard the consumers. This writer shall therefore proceed to unravel and evaluate the benefits passing off as a tort has served both business men and consumers.

Firstly, passing off enforces fair trade practices amongst manufacturers against an exacting standard: **honesty.** The principle underlying the tort of passing off is that put forward in ***Perry v Truefitt***[[9]](#footnote-10) ‘a man is not to sell his own goods under the pretence that they are the goods of another man’. Passing off protects traders against dishonest competitors using unregistered and unregistrable trademarks, selling second-hand goods of a business as new goods, selling imitation goods and services, or re-selling goods and services of the business.[[10]](#footnote-11) Manufacturers can enjoy exclusive rights and the sole ownership of their products as the action of passing off can stop other copycats from unauthorized sale or the marketing of products as that of the manufacturer.

Secondly, to business owners, passing off claims helps promotes business innovation by establishing exclusive rights to sell newly developed brand products. Absence of passing off claims will lead to the lack of those exclusive rights, and by extension result in the imitation of the plaintiff’s goods by competitive rivals without compensation; hence companies and individuals will be reluctant to invest money and effort into research and commercialization activities. Passing off claims plays a vital role in encouraging innovative people and rewarding them for their ideas, thus driving productive growth.[[11]](#footnote-12)

Thirdly, passing off prevents customers from making wrong or erroneous purchases. It protects them from investing in counterfeit goods. Passing off claims give the consumers assurance that they are purchasing safe, guaranteed products. Passing off helps consumers make an educated choice about the safety, reliability, and effectiveness of their purchases. Passing off claim helps to foster the confidence and ease of mind that consumers demand and markets rely on.

In addition, an action for passing off prevents one trade from damaging or exploiting the goodwill and reputation built up by another. The principle is that no man is entitled to represent his goods or his business as that of another. It protects traders against that form of unfair competition, which consists in acquiring for oneself, by mans of false or misleading devices, the benefit of the reputation already achieved by rival traders.

Furthermore, passing off claims protects consumers who would otherwise be confused as to the origin or nature of the goods or services, which are offered. It increases the loyalty customers have in a business and gives them the satisfaction they want from the goods. It enables traders to prevent their rivals from deceiving consumers that there is a connection between their products. It also prevents one person from holding out his or her goods or services as having some association or connection with the plaintiff when it is not true.[[12]](#footnote-13)

Finally, it ensures that products are original, genuine, authentic and of high quality, the quality that customers expect and identify with. It encourages the production of more authentic goods and discourages the sale and production of counterfeit goods by competitors which could end up being dangerous or serve as a threat to the health of the consumers.

**Conclusion**

The tort of passing off has over the years shown to be highly instrumental to the 21st century commercial activities and has prevented exploitation by stopping others from passing off their goods and services as having come from the plaintiff by misrepresentation indicial of the plaintiff’s reputation thus protecting the plaintiff’s goodwill. It is therefore the recommendation of this writer that the necessary framework for passing off actions be strengthened to enable continued defense of the good will and reputation of businesses.

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2. (1865) 11 H.L [↑](#footnote-ref-3)
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5. (1901) AC 217 [↑](#footnote-ref-6)
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7. (1931) 16 N.L.R 1. [↑](#footnote-ref-8)
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